No. 80-525

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1980

ROBERT BUSCHMANN,

Petitioner,

vs.

THE UNITED NEW YORK SANDY HOOK PILOTS' ASSOCIATION AND THE BOARD OF COMMISSIONERS OF PILOTS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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QUESTION PRESENTED FOR REVIEW

Whether persons entitled to a pre-termination hearing as a matter of constitutional right, who have been summarily dismissed without such hearing from a state-mandated apprenticeship program which is the sole and exclusive avenue to a state license required to perform certain work, are entitled to reinstatement plus back pay and other entitlements to remedy the deprivation of such constitutional right to a pre-termination hearing.

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner Robert Buschmann respectfully prays that a writ of certiorari issue to review the final order of the Court of Appeals of the State of New York entered on July 3, 1980.

OPINIONS BELOW

Petitioner originally brought a proceeding under Article 78 of the New York Practice Law and Rules to review the actions of the respondents. The New York State Supreme Court, Kings County, in an unreported memorandum decision dated April 12, 1974, dismissed the petitioner's petition (Appendix, *infra,* 1a). That decision was affirmed by the Appellate Division of the State of New York, Second Department [46 A.D. 2d 391, 362 N.Y. Supp. 2d 556 (2nd Dept. 1975)] (2a). The order of the Appellate Division was reversed by the New York State Court of Appeals and remitted to the Supreme Court, Kings County, for a further evidentiary hearing on the opinion of the dissenting judges below [38 N.Y.2d 774, 381 N.Y.S. 2d 865, 345 N.E. 2d 337 (1975)] (11a).

On the remittitur, the Supreme Court issued an unreported decision (12a), which the Appellate Division, Second Department, affirmed (24a). The Court of Appeals refused to review the decision of the Appellate Division by an order issued without opinion (26a, 27a).

JURISDICTION

The order of the Court of Appeals of the State of New York was entered on July 3, 1980. This petition for certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS

United States Constitution. Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in

the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment XIV, §1

In the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Robert Buschmann was summarily dismissed without any hearing from an apprenticeship during the midst of a state-mandated program which is the sole and exclusive avenue to New York licensure in his chosen livelihood as a harbor pilot in the Port of New York. The New York state courts have confirmed his right to a hearing on preferred charges, but have ordered as a remedy only a post-termination hearing with no redress for the losses occasioned as a result of the illegal termination some seven years ago. Several federal courts of appeal have determined, contrary to the highest court in New York, that dismissal under such circumstances must be preceded by a hearing on charges and that, absent a pre-termination hearing, reinstatement plus back pay is an appropriate remedy.

A. Background

By law, the only persons who may pilot foreign and American vessels under register in New York Harbor are members of the respondent United New York Sandy Hook Pilots' Association ("Association") (A84, A194).[1] Membership in the Association is limited to individuals who are licensed as New York Sandy Hook Pilots. The respondent Board of Commissioners of Pilots ("Commissioners") is enjoined by state statute to oversee the Association and is charged with the sole responsibility for licensing individuals as New York Sandy Hook Pilots. *Id.* N.Y. Nav. Law §90 (McKinney Supp. 1979-1980). According to New York state law, the Commissioners must register all Sandy Hook Pilot apprentices and the Association must train them. In actuality, the Commissioners rely completely upon the Association to recommend apprentices for registration (A102-A103). No one has ever been registered without the recommendation of the Association, and the Commissioners have never refused to register anyone recommended by the Association (A102, A111-A112).

In order for an individual to be recommended by the Association for registration by the Commissioners as a Sandy Hook Pilot and, thereby, gain the right to earn a livelihood as a

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1. As a further reading of petitioner's Statement of the Case will elucidate, Mr. Buschmann's cause brought him before the Appellate Division of the New York State Supreme Court, Second Department, twice, once in 1975 and again in 1979. In addition, prior to the New York Court of Appeals' refusal to consider his appeal by order dated July 3, 1980, Mr. Buschmann's case was heard by that court in 1975.

References to the Record on Appeal to the Court of Appeals in 1975 will be denoted "R___." References to the appellant-respondent's (Buschmann's) Appendix on the appeal to the Appellate Division in 1979 will be denoted "A___." References to the Appendix, *infra*, will be denoted "___a."

Harbor Pilot in the Port of New York, he or she must complete an extensive course of training and study conducted by the Association over a period of about three to three and one-half years, involving at least two hundred eighty hours of instruction (A189, A275). Successful completion of this course of training and study culminates in the acquisition of a United States Coast Guard Federal Master and Pilot License (Master and Pilot License), which authorizes the holder to pilot only American coastwise ships of unlimited tonnage into and out of New York Harbor. Permission to take the test to obtain the Master and Pilot License is granted by the Association (A45-A46), and the Association also makes the appointment for the apprentice to take the test (A201). The federal test itself is the precursor of the test given by the Commissioners for the New York State Sandy Hook Pilot License. In fact, the state and federal tests are similar in content and patterned similarly (A131-A132, A141).

Only after the Master and Pilot License has been obtained does the Association recommend its apprentices for registration by the Commissioners (A48-A49, A84-A85). As noted previously, the Commissioners register whomever is recommended by the Association. After registration by the Commissioners, the apprentices continue working for the Association. Registration by the Commissioners has no effect whatsoever on the duties of an apprentice (A28-A29, A45, A182). Following registration the Commissioners make no inquiry into the activities of apprentices until they interview them approximately two years later (A133-A134). Thereafter, the next contact with the apprentice is when he appears before the Commissioners to take the test for the New York Sandy Hook Pilot License (A136).

B. Robert Buschmann

Petitioner Buschmann's quest to become a New York Sandy Hook Pilot and thereby the right to earn a living as a pilot in

New York Harbor, began in 1964 when, at the age of 14, he applied for apprenticeship in the Association (A9-A10, A14). His application was accepted and he was placed on a waiting list, which he was informed he could expect to stay on "from 8 to 10 years" (R132; A11-A13, A256). During the years Buschmann was on the Association's waiting list, he completed high school and served in the United States Coast Guard, where he continued to pursue his interests in the sea and prepare himself for his apprenticeship with the Association. Upon his honorable discharge from the Coast Guard, Buschmann was called and began his apprenticeship with the Association in January 1970 (R7-R8, R93-R94). Prior to starting, Buschmann completed another application from the Association, this one entitled "Final Application for Apprenticeship" (A15-A16, A257). Then, upon starting, he received a copy of the "Sandy Hook Pilots Apprentice Manual" which, *inter alia*, outlined his study requirements and set forth state and federal license requirements that had to be met as an Association apprentice preparing for the state licensure as a Sandy Hook Pilot (R8, R51-R64, R94, R126; A24, A169). It was common knowledge to Buschmann, the pilots, and all of the apprentices that Buschmann, like all of the apprentices before him, had embarked upon a seven to seven and one-half year apprenticeship program that would lead to licensure as a New York State Sandy Hook Pilot (A154-A155, A203-A204).

During the first three years of his apprenticeship, petitioner Buschmann satisfied all the requirements of his apprenticeship as set down by the Association (R8-R11, R93-R95; A171). This included the obtainment of his federal Master and Pilot License, which, as noted previously, is the final licensing prerequisite to registration by the Association and state licensure as a New York State Sandy Hook Pilot (R54). However, shortly after the acquisition of his federal Master and Pilot License, more than three years after the commencement of his apprenticeship, Buschmann was asked to resign (R11, R96). He

refused and was discharged on February 27, 1973 without a hearing before the Association or the Commissioners and without formal charges brought against him and presented to the Association or the Commissioners (R14-R16, R97). The Association's Executive Committee made the decision to discharge Buschmann without giving him any opportunity whatsoever to appear before them (A77-A78). Thereafter, in an effort to avoid litigation, counsel for Buschmann met informally with Association officers and counsel, without Buschmann present, to discuss the situation and ask for their reconsideration of Buschmann's discharge and his reinstatement as an apprentice. Upon reconsideration, and again without charges or a hearing brought before either the Association or the Commissioners, the Association affirmed its original decision and refused to reinstate Buschmann because it was "in the best interest of the pilots individually (and) the Association as a whole" (R15-R16, R80-R82).

Prior to his discharge Buschmann had never once in his three years been disciplined by the Association (R11-R13, R96). He performed all apprenticeship duties satisfactorily, consistently receiving very high grades, and secured all required licenses well in advance of the timetable set forth by the Association in its Apprenticeship Manual (A250-A251, A271). He was highly regarded by those with whom he worked, as attested by a petition from 19 of the 21 apprentices serving with him, all of whom vouched for his capabilities as a seaman and his integrity as a person and asked for his return to work (R14, R79). His only "fault" was that he had been the subject of malicious charges made by a fellow apprentice[2] in a private dispute completely unrelated to their work and duties as apprentices. These charges by the fellow apprentice were

2. This apprentice and another who is the son of one of the members of the Executive Committee of the Association, which committee made the decision to discharge Buschmann, are the only apprentices who did not sign the petition for Buschmann's reinstatement.

pursued criminally by the apprentice and dismissed by the Court wherein they were brought (R11, R93). In fact, it was conceded throughout the state court proceedings that Buschmann's guilt or innocence on the criminal charges was immaterial to the Association's decision (R96-R97). Again, the reason given was that it was "in the best interest of the pilots individually (and) the Association as a whole." There was admittedly no consideration given to Buschmann's interests at all. The Association simply felt they did not want to have both disputants working for the Association and decided to let Buschmann go (R104).

C. The State Court Proceedings

Without completion of his Association apprenticeship the petitioner knew he could not obtain a New York Sandy Hook Pilot License and, consequently, could not pursue his chosen and long-sought career as a harbor pilot in the Port of New York. Therefore, in an attempt to remedy his summary discharge, petitioner brought a special proceeding pursuant to Article 78 of the New York Civil Practice Law and Rules against the respondents, N. Y. Civ. Prac. Law §§7801, *et seq.* (McKinney 1963), seeking a judgment directing respondents to reinstate him without loss of seniority, together with all back pay and other losses resulting from his discharge without a hearing. Initially, Special Term of the Supreme Court of the State of New York, Kings County, in a memorandum opinion dated April 12, 1974 (1a), found that Buschmann was engaged in a pre-apprenticeship program and had not attained the status of an apprentice within the contemplation of Section 90 of the Navigation Law, N.Y. Nav. Law §90 (McKinney Supp. 1979-1980) when discharged. Therefore, the court found Buschmann had not acquired a property right which entitled him to a hearing in accordance with the procedural due process guarantees of the Fifth and Fourteenth Amendments to the United States Constitution [*citing Board of Regents v. Roth*, 408 U.S. 564 (1972)] and dismissed the petition.

On appeal, the Appellate Division of the Supreme Court of the State of New York, Second Department, affirmed in a decision dated January 6, 1975 (2a). The Appellate Division felt that petitioner was not a "person" within the contemplation of Navigation Law §90 and not entitled to the procedural safeguards provided thereunder. The Second Department also rejected the petitioner's assertion that he was entitled to a hearing prior to dismissal on procedural due process grounds under the Fifth and Fourteenth Amendments to the United States Constitution, because, in its opinion, he did not have the type of property right contemplated by this Court in *Board of Regents v. Roth, supra.* However, in a dissenting opinion, two members of the Court argued that Special Term's and the Appellate Division's reliance on *Roth* was misplaced. Considered to be more relevant on the facts of Buschmann's case was *Perry v. Sindermann,* 408 U.S. 593 (1972), where this Court found a college's "*de facto* tenure policy, arising from rules and understandings officially promulgated and fostered, entitled him to an opportunity of proving the legitimacy of his claim to job tenure." On that basis the dissenters felt that petitioner should be afforded an opportunity to show at an evidentiary hearing that the time Buschmann had spent in the Association program leading to a license as a Sandy Hook Pilot was part of an apprenticeship program.

On appeal, the New York State Court of Appeals, in a memorandum opinion dated December 22, 1975, reversed the Second Department and remitted the case to State Supreme Court for an evidentiary hearing on the basis of the opinion of the dissenting judges in the court below (11a). On the remittitur, the State Supreme Court found in an opinion dated December 13, 1978 (12a) that:

> the apprenticeship in which petitioner was engaged, was *de facto* part and parcel of the apprenticeship program itself, . . . that petitioner has a property interest in the continuance of his

> apprenticeship and the opportunity of obtaining his license as a New York Sandy Hook Pilot and that he may not be discharged by the respondent Association without a hearing.

However, as a remedy the Court ordered only that Buschmann be given a hearing on written charges before the Association, the same body which five and one-half years earlier had summarily dismissed the petitioner without formal charges being brought against him or affording him any type of hearing whatsoever.

Petitioner then appealed to the Appellate Division, Second Department, asserting that the *post*-termination hearing before the Association ordered by the Supreme Court was completely ineffective and in derogation of his constitutional right to a *pre*-termination hearing. Accordingly, petitioner argued, the only appropriate remedy is reinstatement with back pay and all other benefits, privileges, and entitlements adversely affected by his dismissal without a *pre*-termination hearing. Although the decision in *Perry v. Sindermann, supra,* cited in Justice Shapiro's dissent upon which the State Court of Appeals had remitted the case for a hearing, held that proof of a property interest sufficient to require procedural due process safeguards did not warrant reinstatement on the facts of that case, it was argued by petitioner to the Second Department that *Sindermann's* progeny made it clear that reinstatement plus back pay and benefits is the appropriate remedy in circumstances such as petitioner's where a *pre*-termination hearing had not been given to him.

The Second Department, however, in an order dated December 10, 1979, (22a), affirmed without opinion the Supreme Court's decision. Petitioner appealed to the New York State Court of Appeals and same was dismissed (26a). Petitioner then moved before the State Court of Appeals for permission to reargue the denial of his appeal as of right or, in the alternative, for leave to appeal. Petitioner's motion was denied by an order entered July 3, 1980 (27a). The grounds for the dismissal by the

New York Court of Appeals was its view that there was no substantial constitutional question.

REASON FOR GRANTING THE WRIT

The order of the New York State Court of Appeals which lets stand the decision granting petitioner a post-termination hearing before the respondent Association as a remedy for the deprivation by that same body of his constitutional right to a pre-termination hearing conflicts with decisions in several federal circuit courts of appeal which have considered what the appropriate remedy should be for deprivation of a constitutional right of the kind possessed by the petitioner.

It is a fundamental precept under the due process clause of the United States Constitution that "except in emergency situations . . . when a State seeks to terminate [a protected] interest . . . , it must afford 'notice and opportunity for hearing appropriate to the nature of the case' *before* the termination becomes effective." *Bell v. Burson,* 402 U.S. 535, 542 (1971). This Court reaffirmed the continued viability of that concept in *Board of Regents v. Roth,* 408 U.S. 564 (1972), holding that "[w]hen protected interests are implicated, the right to some kind of *prior* hearing is paramount." *Id.* at 569-570 (emphasis added).

The Supreme Court of the State of New York, Kings County, applying the principles laid down by this Court in *Perry v. Sindermann,* 408 U.S. 593 (1972), found that the petitioner had a constitutionally protected property interest in the continuance of his apprenticeship (12a). Therefore, under *Bell v. Burson* and *Board of Regents v. Roth, supra,* the petitioner was entitled to a hearing prior to his discharge; however, he was not given one. The state court simply ordered as a remedy for the violation of petitioner's rights under the due process clause only that he be given a hearing before the Association, the same

public body which had years before dismissed him without the benefit of a hearing or even informing him of the charges against him. That decision was affirmed by the Appellate Division, Second Department (22a) and refused review by the New York Court of Appeals (26a, 27a). The remedy accorded the petitioner by the New York Court of Appeals is in clear conflict with several federal courts of appeal which have considered the propriety of reinstatement plus back pay as a remedy where individuals have been denied due process in essentially the same circumstances.

The Court of Appeals for the Fourth Circuit, when faced with circumstances very similiar to those surrounding the petitioner's case, found that the only appropriate remedy was reinstatement with back pay. *McNeill v. Butz*, 480 F. 2d 314 (4th Cir. 1973). Specifically, one of the plaintiffs in *McNeill*, Dolores Canaday, was discharged by the Department of Agriculture for failing to perform her duties. It was alleged that she had mutilated two filed lease agreements and replaced them with erroneous ones. Although she was given a hearing prior to discharge, she was not allowed to cross-examine or confront her accusers. Relying on this Court's decision in *Board of Regents v. Roth, supra*, the Fourth Circuit found that Canady had a liberty interest which gave her a right to procedural due process. The Fourth Circuit initially noted this Court's emphasis of "the critical nature of the right to cross-examine adverse witnesses." 480 F. 2d at 321. Then, because Canady had not been given a chance to cross-examine her accusers and, therefore, not afforded proper due process prior to her dismissal, the Court ordered her to be reinstated with back pay plus interest, less any interim earnings from other employment.

Indeed, this Court has also stated that it is fundamental that an individual possessing a constitutionally protected interest be given a hearing prior to termination of that interest. *Bell v. Burson, supra; Board of Regents v. Roth, supra.* It does not

matter whether that person is possessed of a constitutionally protected liberty interest as in Canady's case, or a constitutional property interest, as in the petitioner's case. In both instances he or she is entitled to due process prior to termination of that interest. *Board of Regents v. Roth*, 408 U.S. at 571-572. However, while petitioner's property interest in his Association apprenticeship leading to state licensure was illegally taken from him without the benefit of the pre-termination hearing mandated by the due process clause, the only remedy ordered was a hearing before the same body which had violated his constitutional rights initially. The Fourth Circuit, on the other hand, in a situation where the plaintiff was also found to have been denied proper due process, ordered that the discharged employee be reinstated with back pay. The conflict of opinion between the New York State Court of Appeals and the Fourth Circuit on the issue of the proper remedy for the violation of an individual's due process rights where the individual is deprived of his job is clear.

In *Skehan v. Board of Trustees of Bloomsburg State College*, 501 F. 2d 31 (3rd Cir.), *vacated in impertinent part and remanded*, 421 U.S. 983 (1974), *rehearing en banc*, 538 F. 2d 53 (3rd Cir.), *cert. denied*, 429 U.S. 979 (1976), the Third Circuit reached a similar conclusion to that of the *McNeill* court as to the proper remedy to be afforded an individual who is deprived of a proper hearing prior to the deprivation of a constitutionally protected property right. In this instance, Joseph Skehan was employed by the defendants as a Professor of Economics. During the term of his one-year contract of employment he was terminated by the Board of Trustees without the benefit of a hearing prior to his dismissal. Initially, the court found that Skehan possessed a property right under *Perry v. Sindermann, supra*, which could not be terminated without a due process hearing. The defendants then argued that a hearing which was held approximately six weeks after Skehan's termination was sufficient to satisfy his due process rights. The court rejected

that argument, holding that "a hearing after the fact is not the due process equivalent of the pretermination hearing required by *Perry v. Sindermann.*" *Id.* at 38.

The Third Circuit then addressed the plaintiff's contention that the only proper remedy was reinstatement with back pay plus all other entitlements, contrary to the District Court's award of only nominal damages based on its assumption that even if Skehan had been given a hearing he would have in all probability been discharged anyway. The Third Circuit held that it was improper for the District Court to substitute its judgment for that which the college should have made. The court continued

> [f]urthermore, if we countenance the practice of making findings which the institution should have made, a substantial incentive toward affording procedural due process prior to contract termination will be removed. The result will be to place considerable unreviewable discretion in the hands of the administrators by permitting discriminatory application of the availability of pretermination hearings. Those discriminated against will be forced to the expense, inconvenience and delay of a lawsuit to get what remains of the due process hearing which should have been provided by the state at the administrative level in the first instance. If the due process protection of contract rights mandated by *Board of Regents v. Roth, supra,* and *Perry v. Sindermann, supra,* is to be meaningful, the sanction for deprivation of that protection must be something more than was awarded in this case.

Id. at 40. The court went on to note that the remedy of

reinstatement is frequently awarded where terminations of employment are unlawful because of procedural defects. However, the court felt constrained to award only back pay to Skehan because he was employed pursuant to a one-year contract which had expired and there was no finding his contract rights would have been extended further.

Indeed, the fears expressed by the Third Circuit have come true in petitioner Buschmann's case. Because of the Association's decision not to give the petitioner a hearing he was "forced to the expense, inconvenience and delay of a lawsuit to get what remains of the due process hearing which should have been provided . . . in the first instance." However, unlike Skehan, petitioner showed at the evidentiary hearing before the New York Supreme Court that his term of employment with the Association was not for a limited time but would eventually have resulted in his licensure as a New York Sandy Hook Pilot and have given him a lifelong career as a Harbor Pilot. Surely, under these circumstances, the Third Circuit would have awarded him reinstatement plus back pay. In any case, a hearing before the Association which had denied petitioner his constitutional right to a pre-termination hearing would hardly be a "meaningful" sanction. It is difficult to conceive that after almost eight years of litigation during which the Association has argued steadfastly against petitioner's right to a hearing that there is any reasonable chance that petitioner would be reinstated following a hearing before the Association. A hearing, the result of which is a foregone conclusion, hardly constitutes the meaningful sanction that the *Skehan* court felt was mandated by this Court's decision in *Perry v. Sindermann, supra.*

Finally, in *Cain v. McQueen,* 580 F. 2d 1001 (9th Cir. 1978), the Court of Appeals for the Ninth Circuit found that in the right circumstances an individual deprived of a constitutionally protected property right without benefit of a

pre-termination hearing is entitled to be reinstated with back pay. In this case plaintiff was not given a hearing on the reasons for her contract not being renewed and she instituted a suit claiming deprivation of her job in violation of procedural due process. The District Court held that an applicable Nevada statute gave her a property interest within the meaning of the Fourteenth Amendment which was violated, but did not grant her reinstatement. On appeal, the Ninth Circuit did not find it necessary to determine what procedural safeguards were required by the due process clause because the plaintiff was held to at least be entitled to the safeguards under the Nevada statute, which included being given reasons for her discharge and an opportunity to reply prior to actual termination. In determining the proper remedy the court held there must be "a careful weighing of all facts and circumstances." *Id.* at 1005. The court went on to note, citing *Skehan, supra,* that an important consideration is the time lag between the wrongful termination and the hearing stating that "there is probably a greater likelihood that the original termination decision will be upheld if the hearing is held long after the event than if a hearing is held before the termination becomes effective." *Id.* at 1006. Also, the court held reinstatement to be an appropriate form of relief when used to discourage the taking of similar actions against others in the future. Finally, the court noted that when considering reinstatement the disadvantage to the school district should be considered.

Although the court left the remedy to be worked out between the plaintiff and the Board of Trustees of the school district, with the proviso that it could interject itself to enforce plaintiff's rights to due process of law, it specifically mentioned that it had previously reinstated a teacher who was terminated without due process of law. *Stewart v. Pearce,* 484 F. 2d 1031 (9th Cir. 1973).

When all the circumstances surrounding the petitioner's case are carefully weighed it is clear that the proper remedy to be

awarded is reinstatement plus back pay and all other entitlements. First of all it has been approximately seven and one-half years since the petitioner was illegally discharged. In fact, the Ninth Circuit made specific mention of a case where after a court-ordered hearing held only two years following the plaintiff's termination the defendants confirmed the dismissal. *Brown v. Bathke,* 566 F. 2d 588 (8th Cir. 1977). It is inconceivable that after seven years the Association would reinstate the petitioner following a hearing. The following observation by the Third Circuit in *Skehan,* 501 F. 2d at 38, is persuasive:

> "[b]ut there is a substantial difference in the position of the parties once termination has actually occurred. First, the employee, cut off from payroll, is greatly disadvantaged in his ability to pursue the hearing remedy. He may be forced by the necessity for survival to seek other employment which will foreclose the pursuit of reinstatement. Second, the institution will have made substitute teaching arrangements, thus introducing into the hearing consideration of the interests of other faculty members. This inevitability will increase whatever tendency may already exist for the hearing officials to defer to the administration's decision. We agree with the district court, therefore, that a hearing after the fact is not the due process equivalent of the pretermination hearing required by *Perry v. Sindermann, supra. See* 358 F. Supp. at 434-435. The termination of Skehan's 1970-71 contract violated procedural due process."

Therefore, common sense alone indicates that the remedy provided to the petitioner by the state courts is ineffectual and meaningless. Additionally, reinstatement of the petitioner would

serve the positive purpose of discouraging the Association from taking similar action against others.

In summary, this Court has held that "the fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Matthews v. Eldridge*, 424 U.S. 319, 334 (1976); *see Armstrong v. Manzo*, 380 U.S. 545 (1965). The respondent Association's arbitrary refusal to give the petitioner a hearing prior to his dismissal deprived him of that opportunity. The remedy ordered by the New York state courts — a hearing before the same body which refused to grant the petitioner a hearing before his arbitrary dismissal seven and one-half years ago—is equally meaningless and ineffective in redressing the wrong done the petitioner. Indeed, the remedy ordered by the New York Supreme Court and left undisturbed by the New York Court of Appeals conflicts with decisions of the Courts of Appeals for the Third, Fourth, Ninth Circuits on this important issue of the proper remedy to be accorded an individual who is terminated from employment in which he as a constitutionally protected interest without benefit of a pre-termination hearing.

CONCLUSION

For the reasons set forth above, the petition should be granted.

Respectfully submitted,

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APPENDIX

MEMORANDUM DECISION OF NEW YORK STATE SUPREME COURT, KINGS COUNTY DATED APRIL 12, 1974

SUPREME COURT : KINGS COUNTY

(Same Title)

(SPECIAL TERM, PART I)

BY: FEIDEN, J.

DATED: April 12, 1974

In this Article 78 proceeding petitioner seeks judgment directing respondents to reinstate him without loss of seniority rights, together with all back pay as a result of his alleged wrongful discharge without a hearing. Petitioner was engaged in a pre-apprenticeship program. He had not attained the status of an apprentice within the contemplation of Sec. 90 of the Navigation Law when he was discharged. He had not as yet acquired a property right to require a hearing (*Roth v. Board of Regents*, 408 U.S. 564). Accordingly, the petition is dismissed in all respects.

Submit order.

s/ Murray T. Feiden
J. S. C.

OPINION OF NEW YORK STATE SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT

In the Matter of Robert BUSCHMANN, Appellant, v. The UNITED NEW YORK SANDY HOOK PILOTS' ASSOCIATION and the Board of Commissioners of Pilots, Respondents.

Supreme Court, Appellate Division, Second Department.

Jan. 6, 1975.

Before HOPKINS, Acting P.J., and MARTUSCELLO, LATHAM, SHAPIRO and CHRIST, JJ.

CHRIST, Justice.

This appeal requires us to consider the validity of the petitioner's dismissal from employment, in the light of claimed statutory safeguards and procedural due process protections.

The petitioner has been seeking a career as a harbor pilot in the New York Sandy Hook pilot service. To this end, in January, 1970 he enrolled in a training program which has been referred to in the record as a "pre-apprenticeship" or "applicant apprentice" program. During the course of his employment in this training program certain accusations not related to the performance of his duties were made against him by a person enrolled as an apprentice in a statutorily-authorized four-year harbor pilot apprenticeship. The petitioner was subsequently discharged from the pre-apprenticeship training course on the stated ground that his continuance therein would not be in the best interest of either the pilots individually or the United New York Sandy Hook Pilots Benevolent Association, of which the respondent Pilots' Association is a subsidiary. Although the petitioner's attorney appeared before the executive committee of

the Benevolent Association to argue in his client's behalf, it is conceded that the petitioner was discharged without a written complaint having been filed and without benefit of an investigation or an evidentiary hearing. In the instant proceeding the petitioner seeks an annulment of his discharge, and reinstatement, with full seniority rights and restitution of back pay.

Pilotage service in the Port of New York is governed by the provisions of article 6 of the Navigation Law. Section 90 thereof provides that no person may be licensed as a harbor pilot for the Port of New York for certain routes (Sandy Hook, etc.) without first having served as an apprentice in the New York Sandy Hook pilot service for at least four years. The respondent Board of Commissioners of Pilots is a public body created by statute, exercising State authority (Navigation Law, §87). It is charged with over-all supervisory responsibility in the establishment and conduct of the mandated apprenticeship program. The board has specific statutory duties: it must establish qualifications for entry; it receives and passes upon applications; it must register and certify to the Benevolent Association those persons accepted into apprenticeship; and it must examine each apprentice upon completion of apprenticeship training, prior to licensing. However, the statute vests responsibility for the actual instruction of apprentices in the executive committee of the Benevolent Association, subject to over-all board regulation.

It is undisputed that the petitioner was employed by the Pilots' Association in a training program looking eventually toward appointment to the apprenticeship program. It is also undisputed that he never became an apprentice under the statute. Such appointment can only be made by the Board of Commissioners of Pilots. The petitioner never applied to the

board for such appointment. He was never so appointed and the records of the board do not disclose any designation of him as an apprentice. It is conceded that before a person can become a pilot he must be designated as an apprentice and must serve as such at least four years thereafter (21 NYCRR 51.3).

The training program in which the petitioner was engaged was an arrangement neither mandated nor authorized by statute. When he became an employee of the Pilots' Association, the Board of Commissioners had no part in his selection. He must have been well aware that he did not have a board appointment and that he was not an apprentice. The relationship was of employer and employee and it was for the Association to say whether it would keep such a person employed or discharge him.

The arguments advanced by the petitioner at Special Term and on this appeal seek to blur these important distinctions and we are not persuaded that he was, when dismissed, an apprentice entitled to the procedural safeguards set forth in subdivisions 4 and 5 of section 94 of the Navigation Law. That section purports to deal with suspension of pilots and suspension and revocation of pilot licenses. The statute extends certain due process protections to pilots and, ambiguously, to "person[s] connected with a pilot boat" (subd. 4). We do not read the quoted language as applicable to one in the petitioner's position; section 94 must be viewed within the context of the other provisions of article 6. The availability of the procedural safeguards provided in the statute is limited to those persons who are connected in some statutorily-recognized manner with the pilotage service. Despite his enrollment in the pre-apprenticeship program, the petitioner was quite clearly not an apprentice within the statutory framework and not within the categories of persons covered by the statute.

Opinion of New York State Supreme Court, Appellate Division, Second Department

The petitioner further asserts that, even if he was not within a class of persons to which the statutory safeguards extend, he was nevertheless entitled to a hearing prior to dismissal on procedural due process grounds under the Fourteenth Amendment. We disagree. The requirements of procedural due process apply only to the deprivation of interest encompassed by the Fourteenth Amendment's protection of liberty and property.

> "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it" (Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548).

In this case, the petitioner enjoyed no property interest either in continued participation in the pre-apprenticeship program or in advancement into apprenticeship, since it cannot be said that he had a legitimate claim of entitlement to either "benefit".

Likewise, the petitioner's dismissal on the express ground that his continued participation in the training program was not in the best interests of the pilots or the Benevolent Association implied no protected interest in "liberty", even granting a broad sweep to that term (see Board of Regents of State Colleges v. Roth, *supra,* pp. 572-575, 92 S.Ct. 2701).

Further, the record in this case disclosed no significant "rules or mutually explicit understandings" which might support a claim of entitlement to either continued participation in the

pre-apprenticeship training program or to advancement into apprenticeship (Perry v. Sindermann, 408 U.S. 593, 601, 92 S.Ct. 2694, 33 L.Ed.2d 570). In the absence of such factors no constitutionally protected interests were violated by the petitioner's dismissal without a hearing.

The order appealed from should therefore be affirmed, without costs.

Judgment of the Supreme Court, Kings County, dated May 22, 1974, affirmed, without costs.

MARTUSCELLO and LATHAM, JJ., concur.

SHAPIRO, J., dissents and votes to reverse the judgment and to remand the proceeding to Special Term for a full evidentiary hearing, with an opinion, in which HOPKINS, Acting P.J., concurs.

SHAPIRO, Justice (dissenting).

In this article 78 proceeding, the petitioner sought a judgment directing the respondents to reinstate him, without loss of seniority rights, and recovery of back pay, as a result of his alleged discharge without a hearing. The Special Term, relying upon Board of Regents of State Colleges v. Roth (408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548), dismissed the petition in all respects, finding that, since the petitioner had not yet attained the status of an apprentice within the contemplation of section 90 of the Navigation Law, he had not acquired a "property right" which would entitle him to a hearing before discharge. The majority of this court apparently agrees with the Special Term. I do not.

Opinion of New York State Supreme Court, Appellate Division, Second Department

At the time of his discharge, the petitioner was engaged in what the respondents concede to be a 3½ year "pre-apprenticeship" (or "applicant apprentice") training course. This training course is a preliminary step to formal acceptance, by the Board of Commissioners of Pilots, of applications for Sandy Hook pilot apprenticeship, a statutorily mandated four-year apprenticeship program required of all persons who seek licensure as full harbor pilots. The appellant asserts, and on the argument of this appeal the respondents conceded, that every person whose application for Sandy Hook pilot apprenticeship registration has been accepted has completed the "pre-apprenticeship" training course. Realistically, therefore, it must be concluded that the 3½ year pre-apprenticeship training course is a *de facto* prerequisite to participation in the four-year apprentice program provided by section 90 of the Navigation Law, and hence to eventual licensure as a harbor pilot by the Board of Commissioners of Pilots.

Approximately three years after the petitioner began employment with the respondent Pilots' Association as an "applicant apprentice", he was discharged by the executive committee of the United New York Sandy Hook Pilots Benevolent Association (the parent association of the Pilots' Association). The Pilots' Association, in its answer to the petition, explained that, due to a dispute that had arisen between the petitioner and a pilot apprentice, having nothing to do with the appellant's performance as an apprentice, it had determined that it would not be in the best interest of the pilots and the Benevolent Association to retain him in its employ. It is undenied that no written complaint had ever been made to the Board of Commissioners regarding the petitioner's performance of his duties. The Pilots' Association also admits that the board made no investigation to determine the verities of the situation and that the petitioner was not given a hearing.

Opinion of New York State Supreme Court, Appellate Division, Second Department

The Special Term found that since the petitioner was engaged only in a pre-apprenticeship program, for which there is no statutory authorization, he was not entitled to the procedural due process accorded an apprentice by subdivisions 4 and 5 of section 94 of the Navigation Law. Yet it is admitted that the pre-apprenticeship program is virtually mandatory and serves a purpose similar to, if not the same as, the apprentice program. Nevertheless, the respondents claim that such a pre-apprentice applicant is not a "person connected with a pilot boat" within the contemplation of subdivision 4 (*id.*) and therefore is not entitled to the benefit of the procedural due process provisions contained in section 94.

In effect, the respondents have decided, *sua sponte*, to extend a training program (regardless of what name it bears) from 4 to 7½ years, and have done so in the belief that they may safely disregard compliance with specific statutory procedural safeguards accorded aspiring harbor pilots during their last four years of training. Vague formulations, such as "pre-apprenticeship training programs" and "pre-apprentice applicants", developed by the respondents—whether intentionally so designed or not—have the practical effect of establishing additional requirements and procedures for pilot licensure insulated from the constitutional protections against the arbitrary exercise of administrative discretion.

The fact that no statutory protections for due process are provided in the Navigation Law for pre-apprentices is not a sufficient predicate for holding that due process protections may not nevertheless attach (cf. Matter of Hecht v. Monaghan, 307 N.Y. 461, 468, 121 N.E.2d 421, 424). In that case the court said:

> "Although the statutes empowering the hack bureau and the commissioner to grant, suspend

> or revoke a hack driver's license do not expressly require that those licenses may be withdrawn only upon notice and an opportunity to be heard, it is not necessary that they do so. Where the exercise of a statutory power adversely affects property rights * * * the courts have *implied* the requirement of notice and hearing, where the statute was silent, see Wong Yang Sung v. McGrath, 339 U.S. 33, 70 S.Ct. 445, 94 L.Ed. 616; Clarksburg-Columbus Short Route Bridge Co. v. Woodring, 67 App. D.C. 44, 89 F.2d 788, 790; Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 71 S.Ct. 624, 95 L.Ed. 817; Railroad Commission of California v. Pacific Gas & Electric Co., 302 U.S. 388, 58 S.Ct. 334, 82 L.Ed. 2d 319; Bauer v. Acheson, D.C., 106 F.Supp. 445; People ex rel. Copcutt v. Board of Health of City of Yonkers, 140 N.Y. 1, 6-7, 35 N.E. 320, 321)."

As heretofore noted, the question of whether the petitioner had attained a "property right" was answered in the negative by the Special Term on the authority of Board of Regents of State Colleges v. Roth (408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548, *supra*). Such reliance is misplaced. In *Roth*, the respondent, hired for a fixed term of one academic year to teach at a state university, was informed, without explanation, that he would not be rehired for the ensuing year. The court held that the terms of his employment accorded him no "property" interest protected by procedural due process. Most important was the fact that the respondent, already licensed, was working pursuant to a fixed agreement.

Opinion of New York State Supreme Court, Appellate Division, Second Department

More in point with the facts here is Perry v. Sindermann (408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570), decided on the same day as *Roth*. There, the respondent had been employed as a junior college professor for four years under a series of one-year written contracts. The Regents declined to renew his employment for the fifth year, without giving him an explanation or prior hearing. Besides holding that the respondent was entitled to a hearing on First Amendment grounds, the court also found that, though a subjective "expectancy" of tenure is not protected by procedural due process, the respondent's allegation that the college had a *de facto* tenure policy, arising from rules and understandings officially promulgated and fostered, entitled him to an opportunity of proving the legitimacy of his claim to job tenure.

The allegations of the petitioner here to the effect that representations were made to him that the pre-apprenticeship program was part and parcel of the apprenticeship program itself entitles him to an evidentiary hearing. As the Supreme Court said in Perry v. Sindermann (*supra*, p. 603, 92 S.Ct. p. 2700), "Proof of such a property interest would not, of course, entitle him to reinstatement. But such proof would obligate * * * [the respondents] to grant a hearing at his request, where he could be informed of the grounds for his nonretention and challenge their sufficiency."

Consequently, I would reverse the judgment and remand the proceeding to the Special Term for a full evidentiary hearing.

HOPKINS, Acting P.J., concurs in the dissenting opinion of SHAPIRO, J.

OPINION OF NEW YORK STATE COURT OF APPEALS

In the Matter of ROBERT BUSCHMANN, Appellant, v UNITED NEW YORK SANDY HOOK PILOTS' ASSOCIATION et al., Respondents.

Argued November 19, 1975; decided December 22, 1975

Order reversed, with costs in all courts, and the matter remitted to Supreme Court, Kings County, for a hearing, on the dissenting opinion by Mr. Justice J. IRWIN SHAPIRO at the Appellate Division. The remedy under CPLR article 78 is appropriate if only because the organizational structure involved has been created in part by statute and its operations are to some degree regulated by statute in the performance of a public governmental function. In the light of the foregoing it is not necessary to consider the availability to private entities of the procedure under article 78.

Concur: Chief Judge BREITEL and Judges JASEN, GABRIELLI, JONES, WACHTLER, FUCHSBERG and COOKE.

MEMORANDUM OPINION OF NEW YORK STATE SUPREME COURT, KINGS COUNTY

SUPREME COURT : KINGS COUNTY TRIAL TERM
PART 14

By PINO, J.

Dated December 13, 1978

INDEX NO. 21535/78

In the Matter of the Application of ROBERT BUSCHMANN,

vs.

THE UNITED NEW YORK SANDY HOOK PILOTS' ASSOCIATION and THE BOARD OF COMMISSIONERS OF PILOTS,

Respondents-Appellees

A full evidentiary hearing has been held in this matter after it was "remitted to Supreme Court, Kings County" by the Court of Appeals "for a hearing on the dissenting opinion of Mr. Justice J. Irwin Shapiro at the Appellate Division."

This is an Article 78 proceeding in which petitioner seeks a judgment directing the respondents to reinstate him without loss of seniority rights and recovery of back pay as a result of his discharge, concededly, without a hearing. Special Term of this court dismissed this proceeding in all respects upon the ground that petitioner had not yet attained the status of an apprentice within the contemplation of Section 90 of the Navigation Law, and therefore had not acquired a property

right which would entitle him to a hearing before discharge, citing as authority for its ruling the case of *Board of Regents of State College v. Roth* (408 U.S. 504). The majority of the Appellate Division affirmed Special Term's ruling upon the same authority. The Court of Appeals reversed the Appellate Division (33 NY 2d 774); and in effect, agreed with Justice Shapiro's reasoning that "[m]ore in point with the facts here, is *Perry v. Sindermann* (408 U.S. 593); decided on the same day as *Roth*."

It is appropriate, in accordance with the dissenting opinion of Mr. Justice Shapiro, to apply the principles of *Sindermann*, supra. Therefore, if the petitioner, at this evidentiary hearing, has adduced sufficient proof "arising from rules and understandings officially promulgated and fostered" that the "pre-apprenticeship" program, as termed by respondents, in which petitioner was engaged during his employment and prior to his discharge, was *de facto* "Part and parcel of the apprenticeship program itself", then he will have established a constitutionally protected property interest. In such event, he is entitled to a future hearing, at his request, to challenge the sufficiency of his discharge by the respondent employer.

All of the proof herein has been presented by the petitioner, who has offered, in addition to his own testimony and the exhibits received in his behalf, the testimony of Capt. Harry Breitenfeld and Capt. William J. Walsh, representatives of the respondent, The United New York Sandy Hook Pilots' Association (Association) and Stephen M. Seledee, a representative of the respondent, The Board of Commissioners of Pilots (Commissioners). The respondents have offered no proof. The facts which have been further

developed at this hearing are for the most part undisputed, at least with respect to the issue of whether or not the apprenticeship in which petitioner was engaged was an integral part of the apprenticeship itself. The court finds the facts as hereinafter set forth.

It is to be noted that pursuant to Section 90 of the Navigation Law, which provides for registration of apprentices for a four-year apprenticeship, the Association has complete control over the apprentices and exclusive authorization for conducting the apprenticeship program that is a prerequisite to licensure by New York State of a New York Sandy Hook Pilot.

On May 12, 1964, after having been sponsored by a licensed New York Sandy Hook Pilot, petitioner's "application for apprenticeship" was accepted by the Association and he was advised that his name was being placed on a waiting list, to be called in eight to ten years. Thereafter, he completed high school and served in the U.S. Coast Guard. Upon his Honorable Discharge, in January 1970, after notification, he commenced employment with the Association as an "Apprentice." Prior to starting his employment, he completed a form entitled, "Final Application for Apprenticeship" and thereafter received from the Association its official "Sandy Hook Pilots Apprentice Manual." The foreword of this publication states, "This manual is intended to chart a course for the Sandy Hook Pilot Apprentice as he journeys toward his goal as a Sandy Hook Pilot." The manual introduction reads, "Welcome to the Sandy Hook Pilotage Service. As a Sandy Hook Pilot Apprentice you are embarking on perhaps the greatest experience of your life." Section 3 of the manual entitled,

Memorandum Opinion of New York State Supreme Court, Kings County

"License Requirements" lists seven certificates or licenses. They include Ordinary Seaman's Papars, Radio Telephone License, Able-Bodied Seaman Certificate, Lifeboat Certificate, Motorboat License, U.S. Coast Guard Federal Master and Pilot License, and *State Pilot License* (New York Sandy Hook Pilot License). Under the same section appears the following information. "Upon completion of your apprenticeship you must obtain a State Pilot License from your State Board of Pilot Commissioners. This license is issued to you upon successful completion of a test given by the Board of Pilot Commissioners. *This test is essentially the same as the Federal License Test* except that more stress is placed upon the practical application of rules and knowledge of what to do in specific practical applications." This court has read the manual and it is silent as to the statutory registration.

Respondents have not produced evidence of any prior use by them of the terms "Pre-Apprenticeship" or "Applicant Apprentice."

Petitioner testified without contradiction that it was understood among pilots and apprentices with whom he spoke, and by him, that there was but one seven to seven and one-half year Sandy Hook Pilot Apprenticeship period. He similarly testified that the registration requirement provided under Section 90 of the Navigation Law was commonly referred to as "getting your name down with the State Commissioners" and that this occurred three or three and one-half years later, after the apprentice obtained his Federal Master and Pilot License. Prior to his discharge, petitioner was not registered as an apprentice pursuant to statute.

As was conceded prior to this hearing, the Commissioners in practice have never registered an apprentice

except upon recommendation of the Association, and the Association has never recommended an apprentice for registration until three to three and one-half years after the apprentice has continuously performed his duties of apprenticeship, as prescribed by the Association. Commissioner Seledee testified that the Commissioners have never refused to register anyone recommended by the Association.

It has been further confirmed at this hearing, through the testimony of Capt. Breitenfeld, Commissioner Seledee, and Capt. Walsh that although the regulations of the Commissioners at the time of petitioner's acceptance by the Association, merely required a prospective registrant to be in good health and possess the equivalent of a high school education, in practice the Association did not recommend for registration nor did the Commissioners register an applicant so qualified, unless and until he had met all of the license requirements mandated by the Association in its manual, including the obtaining of the U.S. Coast Guard Federal Master and Pilot License. Capt. Breitenfeld and Capt. Walsh corroborated the petitioner's assertion that there was no distinction between a registered and a non-registered apprentice; that the apprentices for the most part continued to perform the same duties before and after registration, and that assignment of duties depended solely upon the apprentice's training, his ability, and whatever licenses he had acquired, including extensions of the basic Federal Master and Pilot License.

It is further undisputed that for a period of three years (he was discharged in February 1973) the petitioner labored many hours together with other apprentices registered and

unregistered, servicing the Association Pilots and Pilot Boats on a work schedule of six hours on and six hours off for six-day periods, followed by three days off, at a maximum pay of two dollars per day; performing duties successively as a Deckhand, Radio Man, and Motorboat Operator, in charge of the motorboat crew; that further in accordance with the requirements set forth in the Sandy Hook Pilots Apprentice Manual, he completed a 280 hour intensive course of study, involving regular study assignments and quizzes, covering some fifteen maritime subjects; that he obtained all of the required certificates and licenses within the time frames prescribed in the manual, including the U.S. Coast Guard Federal Master and Pilot License; that to obtain the latter license, he made the required 32 trips, "riding ships", studied intensively on leave for a two-month period and "sat down" to an examination over a period of 10 or 11 days; that the only other formal examination remaining for him to pass in order to qualify as a New York Sandy Hook Pilot, is the New York State Pilot's Examination given by the Commissioners pursuant to Section 90 of the Navigation Law.

In determining the question as to whether or not the three-year period which petitioner served with the Association is an integral part of the entire apprenticeship, the significance of the Federal Master and Pilot License which he acquired, is pertinent. Section 90 of the Navigation Law prohibits a person from acting as a Pilot for the Port of New York "by way of Sandy Hook or by way of Sands Point or Execution Rock" unless he is so licensed by the State of New York in the manner provided therein. Nevertheless, the U.S. government has for many years asserted its prerogative to issue U.S. Coast Guard Federal Master and Pilot Licenses. These licenses as they affect the Port of New York are limited to the piloting of American

vessels of unlimited tonnage that sail coastwise. The effect of this jurisdictional compromise is that New York Sandy Hook Pilots licensed by the State have for many years been piloting both foreign and American ships leaving for or arriving from foreign ports; as well as coastwise American ships; and rarely are coastwise American ships independently piloted in the Port of New York by those who possess solely a Federal Master and Pilot License. The overwhelming number of ships of all types in New York Harbor are piloted by New York Sandy Hook Pilots, all of whom are members of the Association.

Both types of licenses qualify the respective licensees to the extent of their appropriate extensions, or grades (in the case of Sandy Hook Pilots) to perform the same function, that is to pilot ships in and out of New York Harbor. However, as Commissioner Seledee testified, the major difference between the two licenses is "the ability to get a job." The evidence established that the possibility of earning a livelihood as a pilot is almost nil, unless one is licensed as a New York Sandy Hook Pilot.

Capt. Walsh and Commissioner Seledee both acknowledged nevertheless that the obtaining of the Federal License is an important part of the preparation for obtaining the State Pilot License. The testimony further indicates that the examinations for both licenses are similar; and that both the Commissioners and the Association consider that obtaining the Federal License is a very important part of the preparation in qualifying for the New York Sandy Hook Pilot License, and in practice, they have made it a prerequisite.

Upon the registration and initial interview of the apprentice, according to the testimony of Commissioner Seledee, the apprentice is not interviewed again until two years later when he

is given the title of Boatman, which he testified qualifies the apprentice to pilot the two large pilot boats (these vessels are stationed at the entrance of the harbor to act as transfer points for the pilots). However, in this respect, the court accepts instead Capt. Breitenfeld's testimony to the effect that an apprentice, registered or not, is already qualified to pilot the large pilot boats, after he obtains the basic Federal Master and Pilot License.

Regulation 51.1c of the Commissioners' Regulations provides that during the last nine months of the statutory four-year apprenticeship period, the apprentice is required to make 225 trips aboard inward and outward bound vessels and to receive further instructions relating to various maritime subjects. He must then be examined, and if he passes the state examination, he receives a basic New York Sandy Hook Pilot's License, which entitles him to become a member of the Sandy Hook Pilots' Association. The fee for joining the Association is $7,500. The member pilots share in the pooling of all their pilotage fees, drawing salaries ranging from $25,000 to $50,000 annually in accordance with various grades attained over a seven-year period.

The court finds that petitioner has served a three-year apprenticeship in accordance with "rules promulgated" by the respondent Association; that the efforts he has expended, the training he has received, the skills he has acquired, and the licenses which he has obtained during this period represent a major part of the apprenticeship leading to licensure as a New York Sandy Hook Pilot; that the Association practice, indulged in with the acquiescence of the respondent Commissioners, requiring its apprentices to serve a period of three to three and one-half years and to obtain the various licenses mentioned

herein, prior to recommending them for statutory registration has, *de facto* extended the apprenticeship period to seven years and beyond; and "fostered understandings" with its apprentices, and with the petitioner in particular, that the Sandy Hook Pilot apprenticeship commenced with their employment as "apprentices" and continued, beyond a *pro forma* "getting your name down with the State Commissioners", for an entire period of seven to seven and one-half years. The court further finds that the statutory four-year period represents an inordinate extension of the apprenticeship itself, except for the last nine month portion thereof which requires the apprentices to make the additional trips aboard inward and outward bound vessels, (as hereinbefore mentioned) and to receive further technical instruction. There is no doubt that the effect of the additional statutory four years further improves the skills of the apprentices. However, by *de facto* extending the apprenticeship, respondents have distorted the legislative plan which in effect requires an apprenticeship of about four years.

In view of the foregoing, the court determines that the apprenticeship in which petitioner was engaged, was *de facto* part and parcel of the apprenticeship program itself, inclusive of the statutory apprenticeship; that petitioner has a property interest in the continuance of his apprenticeship and the opportunity of obtaining his license as a New York Sandy Hook Pilot; and that he may not be discharged by the respondent Association without a hearing.

Respondent Association shall within 20 days of petitioner's written request, serve upon him a complaint setting forth in specific detail the grounds upon which he has been discharged. The petitioner shall answer such complaint within 20 days thereafter and respondents shall within 20 days after the service

Memorandum Opinion of New York State Supreme Court, Kings County

of the answer, hold a hearing upon ten days notice to the petitioner, as to the time and place of such hearing. At such hearing a stenographic record of the proceedings shall be made and petitioner shall have the opportunity to confront witnesses and to rebut such evidence as may be adduced against him.

Settle order on notice.

J. S. C.

ORDER OF APPELLATE DIVISION OF THE NEW YORK STATE SUPREME COURT, SECOND DEPARTMENT

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department held in Kings County on December 10, 1979.

HON. MILTON MOLLEN, Presiding Justice,
HON. JAMES D. HOPKINS,
HON. FRANK D. O'CONNOR,
HON. LEON D. LAZAR.
Associate Justices

In the Matter of Robert Buschmann,

Appellant-respondent,

v.

The United New York Sandy Hook Pilots' Association,
Respondent-appellant;

The Board of Commissioners of Pilots,

Respondent.

Order on Appeal from Order

In the above entitled case, the above named Robert Buschmann, petitioner and the above named The United New York Sandy Hook Pilots' Association, respondents in the court below, having cross appealed to this court from an order of the Supreme Court, Kings County, entered January 29, 1979; and said appeal having been argued by Harry H. Rains, Esq., of

counsel for the appellant-respondent and argued by Frederick T. Shea, Esq., of counsel for respondent-appellant, and argued by Richard W. Stone, II, Esq. of counsel for the respondent, and due deliberation having been had thereon; and upon this court's opinion and decision slip heretofore filed and made a part hereof, it is:

ORDERED that the order appealed from is hereby unanimously affirmed, without costs or disbursements, on the memorandum decision of Mr. Justice PINO at Special Term.

Enter:

Clerk of the Appellate Division

Order of Appellate Division of the New York State Supreme Court, Second Department

E/MS

MILTON MOLLEN, P.J.
JAMES D. HOPKINS
FRANK D. O'CONNOR
LEON D. LAZER, JJ.

__AD2d__ A — November 26, 1979

1482 E

In the Matter of Robert Buschmann, appellant-respondent, v The United New York Sandy Hook Pilots' Association, respondent-appellant; The Board of Commissioners of Pilots, respondent.

Rains, Pogrebin & Scher, Mineola, N.Y. (Harry H. Rains, Frederick D. Braid and Marilyn L. Zeitlan of counsel), for appellant-respondent.

Kelley Drye & Warren, New York, N.Y. (Frederick T. Shea and Paul L. Bressan of counsel), for respondent-appellant.

Waesche, Sheinbaum & O'Regan, New York, N.Y. (*Richard W. Stone, II* and Donald M. Waesche of counsel), for respondent.

Order of the Supreme Court, Kings County, entered January 29, 1979 *affirmed* without costs or disbursements, on the memorandum decision of Mr. Justice PINO at Special Term.

Order of Appellate Division of the New York State Supreme Court, Second Department

MOLLEN, P.J., HOPKINS, O'CONNOR and LAZER, JJ., concur.

December 10, 1979 IN RE BUSCHMANN v. THE UNITED NY SANDY HOOK PILOTS' ASSN.

ORDER OF NEW YORK STATE COURT OF APPEALS

Mo. No. 172

In the Matter of Robert Buschmann,

Appellant,

vs.

The United New York Sandy Hook Pilots' Association & ano.,

Respondents.

Motion to dismiss the appeal herein granted and the appeal dismissed without costs, and, on the Court's own motion, the cross-appeal herein dismissed without costs, each upon the ground that no substantial constitutional question is directly involved.

ORDER OF NEW YORK STATE COURT OF APPEALS

mo. No. 516

In the Matter of Robert Buschmann,

Appellant,

vs.

The United New York Sandy Hook Pilots' Association,

Respondent,

and

The Board of Commissioners of Pilots,

Respondent.

(A) Motion for reargument or, in the alternative, for leave to appeal denied.

(B) Cross-motion for leave to appeal dismissed as academic.

No. 80-525

IN THE

Supreme Court of the United

October Term, 1980

ROBERT BUSCHMANN,

Petitioner,

vs.

THE UNITED NEW YORK SANDY HOOK PILOTS' ASSOCIATION

and

THE BOARD OF COMMISSIONERS OF PILOTS,

Respondents.

BRIEF OF RESPONDENT THE UNITED NEW YORK SANDY HOOK PILOTS' ASSOCIATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

FREDERICK T. SHEA
Attorney for Respondent
The United New York Sandy Hook Pilots' Association
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Counter-Statement of the Question Presented for Review

Did the New York State Court of Appeals abuse its discretion in holding that, in the circumstances of this case, the appropriate remedy for the dismissal of petitioner, Robert Buschmann, from his employment with respondent, The United New York Sandy Hook Pilots' Association ("Association") in violation of his due process right to a hearing, is for the Association to hold a hearing upon Buschmann's request, at which Buschmann will have the opportunity to confront witnesses and to rebut such evidence as may be adduced against him?

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No. 80-525

IN THE

Supreme Court of the United States

October Term, 1980

ROBERT BUSCHMANN,

Petitioner,

vs.

THE UNITED NEW YORK SANDY HOOK PILOTS' ASSOCIATION

and

THE BOARD OF COMMISSIONERS OF PILOTS,

Respondents.

BRIEF OF RESPONDENT THE UNITED NEW YORK SANDY HOOK PILOTS' ASSOCIATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Respondent, The United New York Sandy Hook Pilots' Association ("Association"), respectfully prays that the Court deny the Petition for a Writ of Certiorari to review the final order of the Court of Appeals of the State of New York entered on July 3, 1980.

Counter-Statement of the Case

A. Background

To be licensed as a Sandy Hook pilot under the New York Navigation Law, one first must serve an apprenticeship as specified in the Navigation Law. Specifically, the law provides that the Executive Committee of The United New York Sandy Hook Pilots' Benevolent Association ("Benevolent Association"), an unincorporated association that owns all of the outstanding stock of respondent Association (R 101),* has the sole responsibility of training apprentices to become Sandy Hook pilots. To be admitted to this apprenticeship, an applicant must apply to The Board of Commissioners of Pilots ("Commissioners") and, if the Commissioners accept the application, they register the applicant's name on their books and certify that name to the Benevolent Association as a duly registered apprentice. Thereafter, the registered apprentice serves in an apprenticeship, which the Benevolent Association conducts, of not less than four years, at the end of which the Commissioners formally examine the apprentice. If the Commissioners find the apprentice qualified, they license him as a Sandy Hook pilot. *N.Y. Nav. Law,* §90 (McKinney Supp. 1979-80).

In addition to the apprenticeship training program it provides for those apprentices whom the Commissioners register, the Benevolent Association, through respondent

* References prefixed "R" refer to the Record on Appeal to the Court of Appeals in 1975; references prefixed "P" refer to pages of the Petition for a Writ of Certiorari and references prefixed "A" refer to pages of the appendix included in the Petition. References to the Appendix, *infra,* will be denoted "——a".

Association, offers a pre-registration training program of approximately three and one-half years in duration to its employees who man the Association's pilot boats and who wish to take advantage of this training to improve their qualifications before applying to the Commissioners for registration as an apprentice in the Sandy Hook pilot apprenticeship program (R 102).

B. Robert Buschmann

In January 1970, the Association hired petitioner, Robert Buschmann, and he joined this pre-registration training program (R 102). Before he completed the program and applied to the Commissioners for registration as an apprentice, criminal charges were leveled against him, asserting that he had made obscene telephone calls to the wife of another employee of the Association, Bruce Punger, who was a pilot apprentice registered on the books of the Commissioners (R 102-103). Buschmann requested, and the Association granted him, a leave of absence to fight the charges (R 103). Thereafter, the District Court of the County of Nassau adjourned a criminal trial of the charges in contemplation of dismissal on the court-imposed condition that Buschmann undergo psychiatric consultation (R 110-113).

Buschmann then sought to continue his employment with the Association. However, in view of the kind of animosity accusations of the character here involved are likely to generate, and in view of the facts then known to it, the Executive Committee of the Benevolent Association, which constitutes the Board of Directors of the Association, asked Buschmann to resign and, when he refused, the Association terminated him in February 1973 (R 104-105).

On May 25, 1973, Buschmann's attorney appeared before three of the four members of the Executive Committee and presented to them on Buschmann's behalf reasons why he believed the Executive Committee should reconsider its decision. As a result of this hearing, the full Executive Committee reconsidered Buschmann's request for reinstatement and his arguments with respect thereto, and decided not to reinstate him (R 81-82, 105-106).

C. The State Court Proceedings

In October 1973, Buschmann instituted a special proceeding under Article 78 of the New York Civil Practice Law and Rules, N.Y. Civ. Prac. Law §§7801, *et seq.* (McKinney 1963), in the Supreme Court of the State of New York, Kings County, against the Association and the Commissioners, alleging that the Association discharged him from employment in violation of the New York Navigation Law and the Fourteenth Amendment of the U.S. Constitution, in that his dismissal was not preceded by a hearing on the reasons for his dismissal (R 7-31). Buschmann asked the court to order his reinstatement to the Association with full seniority and award him any back pay that he lost as a result of his dismissal. The Supreme Court held that neither the Navigation Law nor the procedural due process mandates of the Fourteenth Amendment required respondents to give Buschmann a hearing and dismissed the petition in all respects on the merits (A 1). The Appellate Division, with Justices Shapiro and Hopkins dissenting, affirmed the order of the Supreme Court (A 2-10).

Buschmann appealed to the Court of Appeals which, on December 22, 1975, after reviewing the record before it and after hearing oral argument by all parties, reversed the order of the Appellate Division (A 11). The Court of Appeals did not hold that respondents violated either the Navigation Law or the Fourteenth Amendment when the Association dismissed Buschmann without a hearing. Rather, the Court of Appeals remanded the case to the Supreme Court for an evidentiary hearing on the dissenting opinion of Justice Shapiro in the Appellate Division.

Specifically, Justice Shapiro had argued that, even if the record before the court did not establish a violation of the Navigation Law or the Fourteenth Amendment, Buschmann should be afforded the opportunity to present, at an evidentiary hearing before the Supreme Court, evidence of alleged representations made to him that, if true, would create a constitutional "property interest" in his employment. Concerning the remedy to be imposed in the event Buschmann successfully established such a property interest, Justice Shapiro had emphasized,

> ". . . As the Supreme Court said in *Perry* v. *Sindermann* (*supra*, p. 603), 'Proof of such a property interest would not, of course, entitle him to reinstatement. But such proof would obligate * * * [the respondents] to grant a hearing at his request, where he could be informed of the grounds for his nonretention and challenge their sufficiency'." (A 10).

Accordingly, upon remittitur, the Supreme Court (per Pino, J.), in accordance with the mandate of the Court of Appeals, stated its duty as follows:

> "It is appropriate, in accordance with the dissenting opinion of Mr. Justice Shapiro, to apply the principles

> of [*Perry* v. *Sindermann*, 408 U.S. 593 (1972)]. Therefore, if the petitioner, at this evidentiary hearing, has adduced sufficient proof 'arising from rules and understandings officially promulgated and fostered' that the 'pre-apprenticeship' program, as termed by respondents, in which petitioner was engaged during his employment and prior to his discharge, was *de facto* 'Part and parcel of the apprenticeship program itself', then he will have established a constitutionally protected property interest. *In such event, he is entitled to a future hearing at his request, to challenge the sufficiency of his discharge by the respondent employer*'' (A 13, emphasis added).

Following the evidentiary hearing in October 1978, the Supreme Court held that Buschmann had established a property interest in his continued employment by the Association (A 12-21) and, accordingly, issued the following Judgment:

> ''[R]espondent, The United New York Sandy Hook Pilots' Association, shall, within 20 days of petitioner, Robert Buschmann's, written request, serve upon him a complaint setting forth in specific detail the grounds upon which he has been discharged. The petitioner shall answer such complaint within 20 days thereafter, and respondent, The United New York Sandy Hook Pilots' Association, shall, within 20 days after the service of the answer, hold a hearing upon ten days notice to the petitioner, as to the time and place of such hearing. At such hearing, a stenographic record of the proceedings shall be made and petitioner shall have the oportunity to confront witnesses and to rebut such evidence as may be adduced against him'' (2a-3a).

Following the Supreme Court's decision and entry of the Judgment, Buschmann did not pursue the course the

New York Supreme Court prescribed to give him a hearing on the reasons for his discharge. Rather, on March 28, 1979, Buschmann appealed to the Appellate Division, alleging, *inter alia,* that the Supreme Court wrongly had denied him reinstatement and back pay. The Appellate Division unanimously affirmed the Supreme Court's Judgment, on the memorandum opinion of Judge Pino (A 22-25).

Buschmann sought an appeal as of right to the New York State Court of Appeals which, on March 20, 1980, the court dismissed upon the ground that "no substantial constitutional question [was] directly involved" (A 26). Thereafter, Buschmann moved for reargument or, in the alternative, for leave to appeal to the Court of Appeals, which the Court denied (A 27). He then filed his Petition for a Writ of Certiorari to this Court on October 1, 1980.

Summary of Argument

The Court should deny the petition. Contrary to Buschmann's contention, the decision of the New York State Court of Appeals does not conflict with decisions of federal Courts of Appeal on a federal question.

The Court of Appeals correctly decided, in the circumstances of this case, that the proper remedy for the Association's not giving Buschmann a hearing on the reasons for his discharge, is for the Association to give Buschmann that hearing within the structure the New York Supreme Court outlined to ensure fundamental fairness and compliance with due process. The Supreme Court's decision in *Perry* v. *Sindermann,* 408 U.S. 593 (1972) requires no more. Federal Courts of Appeal, following *Perry* v. *Sin-*

dermann, supra, clearly have stated that the question of remedy for a violation of procedural due process is a matter within the discretion of the trial court and therefore depends on the circumstances of each case. Thus, Buschmann's claim that the decision of the New York State Court of Appeals *conflicts* with decisions of federal Courts of Appeal that, in the circumstances of those cases, reinstated the terminated employees with back pay, is wrong because he assumes, contrary to law, that reinstatement with back pay was ordered in those cases on the ground that constitutional procedural due process *requires* reinstatement with back pay.

ARGUMENT

The Court should deny the petition because, contrary to petitioner's contention, the New York State Court of Appeals has not decided a federal question in a way that conflicts with decisions of federal Courts of Appeal.

In this proceeding under Article 78 of the New York Civil Practice Law and Rules, N.Y. Civ. Prac. Law §§7801, *et seq.* (McKinney 1963), Buschmann alleged that the Association discharged him from employment in violation of, *inter alia,* the Fourteenth Amendment to the U.S. Constitution because it did not give him a hearing on the reasons for his discharge. He ultimately prevailed on this contention and, accordingly, the New York State Supreme Court, on remittitur from the Court of Appeals, ordered the Association to give him a hearing on the reasons for his discharge. Buschmann now argues to this Court, as he unsuccessfully argued to the New York State Court of Appeals,

that, because some federal Courts of Appeal have ordered reinstatement with back pay to remedy violations of procedural due process in the circumstances of those cases, the New York State Court of Appeals violated the Fourteenth Amendment by not ordering his reinstatement with back pay in the circumstances of this case. He is wrong as a matter of law.

In *Perry* v. *Sindermann, supra,* this Court stated the relief that must be afforded persons, such as Buschmann, who courts find have a "property interest" in their continued employment and who consequently have been denied procedural due process by being terminated without a hearing on the underlying reasons for their terminations.

> "Proof of such a property interest would not, of course, entitle him to reinstatement. But such proof would obligate college officials to grant a hearing at his request, where he could be informed of the grounds for his nonretention and challenge their sufficiency" (*Id.,* at 603).

This is precisely the relief afforded Buschmann.

Subsequent to its decision in *Perry* v. *Sindermann, supra,* this Court further clarified the limited extent of the constitutional procedural due process right by holding that this right does not necessarily *require* a hearing *before* the deprivation of a property interest. *Arnett* v. *Kennedy,* 416 U.S. 134, *rehearing denied,* 417 U.S. 977 (1974). Although unable to agree on a single opinion, a majority of this Court in *Arnett* agreed that, assuming the existence of a property interest in continued employment that requires a hearing on the reasons for termination, it is constitutionally per-

missible to hold this hearing *after* termination.* Clearly, therefore, since due process does not *require* a pretermination hearing, it does not *require* reinstatement with back pay pending the hearing in this case.

Buschmann attempts to circumvent this Court's express teaching in *Perry* v. *Sindermann, supra* and *Arnett* v. *Kennedy, supra,* that proof of a property interest does not mandate reinstatement with back pay pending a due process hearing, by citing a number of cases in which federal courts granted reinstatement with back pay pending such a hearing. In other words, Buschmann argues that because some federal courts, in circumstances completely different from the facts of this case, granted reinstatement pending a due process hearing, the New York Court of Appeals abused its discretion in fashioning the relief it directed in this case by failing to direct reinstatement with back pay.

Specifically, Buschmann argues that the remedy in this case conflicts with decisions of the Courts of Appeal for the Third, Fourth and Ninth Circuits (P 18). However, rather than supporting his contention that due process requires reinstatement with back pay pending a hearing, the cases he refers to show that the courts use their discretion in the circumstances of each case to fashion an appropriate remedy.

For example, in *Cain* v. *McQueen,* 580 F.2d 1001 (9th Cir. 1978), relied on by Buschmann (P 15-16) the court stated,

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* *See also, Alsbury* v. *United States Postal Service,* 530 F.2d 852 (9th Cir.), *cert. denied,* 429 U.S. 828 (1976); *Winston* v. *United States Postal Service,* 432 F. Supp. 1117 (N.D. Ill. 1977), *aff'd,* 585 F.2d 198 (7th Cir. 1978).

> "Plaintiff contends that in addition to a hearing, she is entitled to reinstatement and back pay. This question presents a difficult issue in which a 'careful weighing of all facts and circumstances' must take place. *Burton* v. *Cascade School Dist. Union High School No. 5*, 512 F.2d 850, 853 (9th Cir. 1975). There must be a balancing of plaintiff's interests in her wrongfully terminated teaching position against the possible disruption which her reinstatement may cause the school district *Id.*, at 852-53" (*Id.*, at 1005, citation omitted).

The court went on to emphasize,

> "Not all cases that have found violations of procedural due process and where hearings have been ordered have granted reinstatement and back pay, however. e.g., *Burton* v. *Cascade School Dist. Union High School No. 5*, 512 F.2d 850 (9th Cir. 1975); *Greene* v. *Howard University*, 134 U.S. App. D.C. 81, 412 F.2d 1128 (1969). The disadvantage to the school district should be carefully considered" (*Id.*, at 1006).

Significantly, the court did not order reinstatement and back pay, but left the question of remedy to the discretion of the trial court.

Similarly, in *Skehan* v. *Board of Trustees of Bloomsburg State College*, 501 F.2d 31 (3rd Cir.), *vacated and remanded on other grounds*, 421 U.S. 983 (1974), *cert. denied*, 429 U.S. 979 (1976), relied on by Buschmann (P 13-15), the Third Circuit stated that the "reinstatement remedy has been awarded frequently for terminations unlawful for procedural defects" (*Id.*, at 40), but declined to reinstate Skehan in the circumstances of that case, thereby recognizing that due process does not mandate reinstatement with back pay.

In *McNeill* v. *Butz*, 480 F.2d 314 (4th Cir. 1973), relied on by Buschmann (P 12), the court, likewise recognizing that procedural due process requires a balancing of interests and does not mandate reinstatement with back pay, stated,

> "Procedural due process is a necessary concomitant of a democratic government's obligation to practice fairness . . . However, the requirements of procedural due process may flexibly be adapted to the demands of particular contexts . . ." (*Id.*, at 321, citations omitted).

Hence, there is no question that, regardless of whether in some circumstances a court may award reinstatement with back pay for a violation of procedural due process, the Fourteenth Amendment does not require such a remedy, which is left to the discretion of the court fashioning the remedy. Indeed, in *Bishop* v. *Woods*, 426 U.S. 341 (1976), this Court, holding that the petitioner did not have a property or liberty interest in the circumstances of that case, emphasized,

> "[T]he instances in which the federal judiciary has required a state agency to reinstate a discharged employee for failure to provide a pretermination hearing are extremely rare" (*Id.*, at 349, n. 14).

In fact, federal Courts of Appeal time and time again have held that violations of procedural due process do not require reinstatement with back pay. *See, for example, DiLuigi* v. *Kafkalas*, 584 F.2d 22, 27 n. 7 (3rd Cir. 1978), *cert. denied*, 440 U.S. 959 (1979); *Unified School Dist. No. 480* v. *Epperson*, 551 F.2d 254 (10th Cir.), *vacated and remanded on other grounds*, 435 U.S. 948 (1977); *Navato* v. *Sletten*,

560 F.2d 340 (8th Cir. 1977); *Decker* v. *North Idaho College*, 552 F.2d 872 (9th Cir. 1977); *Mims* v. *Board of Ed. of City of Chicago*, 523 F.2d 711 (7th Cir. 1975); *Wellner* v. *Minnesota State Junior College Board*, 487 F.2d 153 (8th Cir. 1973).

Thus, Buschmann clearly is wrong when he argues that, when the New York Court of Appeals refused to reinstate him with back pay pending his hearing in the circumstances of this case, it decided a federal question in conflict with several federal Courts of Appeal, simply because, in a few cases, those courts held that reinstatement with back pay was the appropriate remedy in the circumstances of those cases. The New York State Court of Appeals in the circumstances of this case satisfied the requirements of procedural due process by ordering the Association to give Buschmann a hearing on the reasons for his discharge, if he requests it. There is no reason for this Court to review its decision.*

Finally, Buschmann contends that the New York State Court of Appeals violated due process by ordering the Association to conduct the hearing (P 11, 18), stating that it is "inconceivable that after seven years the Association would reinstate the petitioner following a hearing" (P 17). Not only is his assumption totally without foundation,** his conclusion clearly is illogical since there can be

* Clearly, if Buschmann effectively rebuts the evidence against him at the hearing and proves that his discharge was arbitrary and capricious he will be entitled to reinstatement and back pay, less his earnings from other sources.

** Certainly, it is not this Court's function to assume, as Buschmann apparently has assumed, that the Association will *not* comport with due process and give him a fair hearing.

no doubt that the detailed procedures outlined in the Judgment, which include a requirement for a stenographic record of the hearing (3a), fully protect his right to a fair hearing. In fact, in *Perry* v. *Sindermann, supra,* this Court recognized the appropriateness of this relief when it ruled that, if Sindermann established a property interest, *college officials* should give him the hearing on the reasons for discharge.*

Conclusion

For all the foregoing reasons, this Court should deny Buschmann's Petition for a Writ of Certiorari.

Respectfully submitted,

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October 30, 1980

* Certainly, Buschmann has the right to return to court if he believes there was any impropriety with the hearing.

APPENDIX

Judgment of the Supreme Court of the State of New York, dated January 18, 1979

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF KINGS

Index No. 21535/73

In the Matter of the Application of

ROBERT BUSCHMANN,

Petitioner-Appellant,

For a Judgment pursuant to Article 78 of the Civil Practice Law and Rules,

against

THE UNITED NEW YORK SANDY HOOK PILOTS' ASSOCIATION

and

THE BOARD OF COMMISSIONERS OF PILOTS,

Respondents-Appellees.

The issues in the above-entitled action having duly come on to be heard before the Hon. Frank J. Pino, a justice of this court, without a jury, at a Trial Term, Part 14, of this Court, held at the courthouse thereof, located at Supreme Court Building, Brooklyn, New York 11201, on the 27th day of September, 1978, and the petitioner, Robert Buschmann, having appeared by his attorneys, Rains, Pogrebin & Scher, Harry H. Rains and Frederick D. Braid, of counsel, and the

respondent, The United New York Sandy Hook Pilots' Association, having appeared by its attorneys, Kelley Drye & Warren, Frederick T. Shea and Paul L. Bressan, of counsel, and the respondent, The Board of Commissioners of Pilots, having appeared by its attorneys, Bigham Englar Jones & Houston, Donald M. Waesche and Richard W. Stone, II, of counsel, and the issues having been duly tried, and the court having considered the briefs filed by petitioner, Robert Buschmann, and respondents, The United New York Sandy Hook Pilots' Association and the Board of Commissioners of Pilots, and the court after due deliberation having rendered and filed its decision in writing, dated December 13, 1978, in favor of the petitioner, Robert Buschmann, and against the respondents, The United New York Sandy Hook Pilots' Association and The Board of Commissioners of Pilots, and directing entry of judgment thereon,

Now, on motion of Rains, Pogrebin & Scher, Harry H. Rains and Frederick D. Braid, of counsel, attorneys for petitioner, it is

ORDERED, ADJUDGED AND DECREED, that respondent, The United New York Sandy Hook Pilots' Association, shall, within 20 days of petitioner, Robert Buschmann's, written request, serve upon him a complaint setting forth in specific detail the grounds upon which he has been discharged. The petitioner shall answer such complaint within 20 days thereafter and respondent, The United New York Sandy Hook Pilots' Association, shall, within 20 days after the service of the answer, hold a hearing upon ten days notice to the petitioner, as to the time and place of such hearing.

At such hearing, a stenographic record of the proceedings shall be made and petitioner shall have the opportunity to confront witnesses and to rebut such evidence as may be adduced against him.

Judgment signed this 18th day of January, 1979.

/s/ Frank J. Pino
Judge

/s/ Anthony N. Durso
Clerk

FILED

'79 Jan 29 No: 30
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No. 80-525

In The

Supreme Court of the United States

October Term, 1980

ROBERT BUSCHMANN,

Petitioner,

vs.

THE UNITED NEW YORK SANDY HOOK PILOTS' ASSOCIATION AND THE BOARD OF COMMISSIONERS OF PILOTS,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

REPLY BRIEF FOR PETITIONER

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THE UNITED NEW YORK SANDY HOOK PILOTS' ASSOCIATION AND THE BOARD OF COMMISSIONERS OF PILOTS,

Respondents.

On Petition for Writ of Certiorari to the Court of Appeals of the State of New York

REPLY BRIEF FOR PETITIONER

To the Honorable, Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner Robert Buschmann respectfully submits this brief in reply to certain arguments first raised by respondent The United New York Sandy Hook Pilots' Association in its brief in opposition to the petitioner's petition for a writ of certiorari to the Court of Appeals of the State of New York.

ARGUMENT

In its brief in opposition to the petition, the respondent United New York Sandy Hook Pilots' Association (hereinafter "Association") specifically cites a meeting between the petitioner's attorney and the respondent's Executive Committee, which it glibly characterizes as a "hearing" (B4).* However, the actual circumstances of that meeting are not explained nor is it ever mentioned in respondent's argument. In fact, the respondents have blatantly mischaracterized as a "hearing" what was in actuality a settlement conference which was not even attended by the petitioner. This notation of a settlement meeting appears to be an attempt by the respondents to leave this Court with the impression that Buschmann was actually afforded a hearing or, at the very least, color the case against the petitioner. Such an attempt is both inexcusable and reprehensible.

The meeting to which the respondents refer was held after the petitioner had already been discharged. The petitioner's attorneys asked to meet with the Executive Committee so that an equitable solution could be reached before the petitioner was forced to institute suit in court to regain his job. This meeting, which was not attended by the petitioner himself, was purely for the purposes of settlement and was not a "hearing" as the respondents would have the Court believe. While this meeting was raised as an affirmative defense by the respondent in its answer in the original Article 78 proceeding brought by the petitioner (R104-106), they never presented any evidence whatsoever to prove that affirmative defense, as was their burden under New York law. *See Besunder v. Coughlin,* 102 Misc. 2d 41, 422 N.Y.S. 2d 564 (Sup. Ct. Nassau County 1979); N.Y. Civ. Prac. Law §3018 (McKinney Supp. 1979-80). Indeed,

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* References to the Record on Appeal to the Court of Appeals in 1975 will be denoted "R___." References to the respondent's Brief in Opposition to the Petition for a Writ of Certiorari will be denoted "B___"

the respondent admitted in its original answer to Buschmann's petition pursuant to Article 78 that "there had been no hearing before the Commissioners on any complaint made against the petitioner." (R98). Finally, it should be noted that evidence of attempts to settle a claim is simply not admissible to prove the invalidity of that claim. *See Tenant v. Dudley*, 144 N.Y. 504 (1895); Proposed New York Code of Evidence §408 (1980); Federal Rules of Evidence §408 (1980).

Therefore, the petitioner implores this Court to ignore the respondent's reprehensible reference to the settlement meeting held between the Association's Executive Committee and the petitioner's attorneys after the petitioner had been discharged.

CONCLUSION

For the reasons set forth above and those already stated in the petitioner's original brief, the petition should be granted.

Respectfully submitted,

s/ Harry H. Rains
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